Supreme Court, U.S.
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NO. 02-1493

IN THE

Supreme Court of the United States

OCTOBER TERM, 2002

CHRISTINE A. CUMMINGS; JANET TAYLOR DARVAS; RICHARD K. DEHART; CHRISTOPHER GARBANI; PATRICIA A. MCCUMSEY; DANIEL NOWALIS; CLAUDIA STEWART, AND THE CLASS THEY REPRESENT,

Petitioners,

v.

STEVE WESTLEY; MARTY MORGENSTERN; AND CALIFORNIA STATE EMPLOYEES ASSOCIATION, LOCAL 1000, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO-CLC,

Respondents.

On Petition for Writ of *Certiorari* to the United States Court of Appeals for the Ninth Circuit

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PETITIONERS' REPLY BRIEF

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ARGUMENT

I. PETITIONERS OMIT NO "CRUCIAL" FACTS.

The Brief in Opposition of Respondent California State Employees Association, Local 1000, Service Employees International Union, AFL-CIO-CLC ("CSEA"), differs from Respondent Marty Morgenstern's ("Morgenstern's Opp.") only in its attention to the fourth Question Presented. CSEA's Brief in Opposition ("CSEA's Opp."), pp. 1-4, 7-13. Respondent Steve Westley, substituted for Kathleen Connell pursuant to Sup. Ct. R. 35.3, declined to file a separate opposition.

CSEA cites "omitted" facts purportedly "crucial" to this Court's determination as to whether to grant *certiorari* on the fourth Question Presented. CSEA's Opp. at 1-4. CSEA's argument is that, because each of its relevant notices was only a little constitutionally inadequate, the Ninth Circuit was justified when it reversed the District Court order requiring restitution of only the nonchargeable portion of the fee, and refused to order disgorgement of all of the illegally-seized fees.

It is undisputed that each of CSEA's four notices met at least some of the "constitutional requirements for the . . . collection of agency fees." *Teachers Local No. 1 v. Hudson*, 475 U.S. 292, 310 (1986). CSEA's Opp. at 2. However, that is irrelevant. As at least one court has noted when a union offered a similar argument, "it is clear that a procedure which meets only part of [*Hudson*'s] requirements is constitutionally inadequate." *Lehnert v. Ferris Faculty Ass'n*, 707 F. Supp. 1473, 1477 (W.D. Mich. 1988). And what is "undisputed"—and relevant—is that "[c]onstitutionally-adequate notice and procedures under *Hudson* were not provided to the employees until May 2000. App. [Appendix] C at 25a." Petition at 4.

Like the Ninth Circuit's decision, CSEA's argument assumes that nonmembers are harmed, not by the unconstitutional seizure of fees from their wages, but by the contents of a union's notice and procedures. App. A at 15a. Under this flawed view of this Court's forced-unionism decisionmaking, a tardily-issued notice complying with *Hudson*'s requirements "completely remedied . . . whatever harm fee payers might have incurred through the omission of the auditor's verification." CSEA's Opp. at 2-3.

Equally irrelevant to the period at issue here—*i.e.*, when California's State Controller was seizing on behalf of CSEA agency fees in the absence of the "constitutional requirements for the . . . collection of agency fees," *Hudson*, 475 U.S. at 310—is the purported "good faith" of CSEA,[1] or the fact that "any delay in the issuance of the May 2000 notice was attributable to the district court's interim orders and comments during hearings which failed to provide clear guidance as to what was required." CSEA's Opp. at 3, *quoting* App. E at 41a & App. A at 4a, 15a.

The Ninth Circuit's notion of "good faith" uniquely serves CSEA's pecuniary interests, and defies the facts. It ignores fee seizures for three months absent **any** financial disclosure (pursuant to CSEA's first notice in April 1999). Record ("R.") 1, Exhibit ("Ex.") E. It also ignores fee seizures occurring for another six months pursuant to a second notice, R. 1, Ex. F, that defied this Court's requirement of financial disclosure containing "verification by an independent auditor," *Hudson*, 475 U.S. at 307 n.18. Both notices were constitutionally deficient because

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[1] CSEA was never found to have "acted in good faith at all times." CSEA's Opp. at 2. The "good faith" found by the courts below was noted only in reference to CSEA's behavior after being hailed into court. App. A at 15a.

"they . . . failed to provide a copy of the Audit in the absence of a fee payer's formal request." App. E at 38a.[2]

The lower courts' adjudication offends even primitive notions of justice insofar as it visits upon Petitioners the costs of the District Court's error. Even if the source of some of CSEA's errors can fairly be traced to the District Court—prompted, of course, by CSEA's arguments—due process is not satisfied when those wronged by CSEA must bear their costs. *Cf. City of Riverside v. Rivera*, 477 U.S. 561, 580 n.11 (1986) ("Those who elect a militant defense . . . . cannot now disclaim the consequences of their actions," in context of attorneys' fees).

II. THE COURT'S PRIOR EXERCISE OF ITS DISCRETION IS AN INSUFFICIENT REASON TO DENY *CERTIORARI* ON THE IMPORTANT QUESTIONS PRESENTED BY THE PETITION.

By failing to address the arguments presented in the Petition, Respondents CSEA and Morgenstern virtually concede the serious conflicts presented by the decision below on the first three Questions Presented. Respondents CSEA and Morgenstern posit only that "[n]othing has changed since this Court denied a similar Petition for *Certiorari* on these same issues just two months ago." Morgenstern's Opp. at 3; CSEA's Opp. at 6.

What has changed, however, is that the Ninth Circuit has for a **third time** flouted this Court's decisionmaking and conflicted

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[2] CSEA's argument that the second notice was adequate because the figures contained in it were "taken from the independent audit of CSEA's 1998 financial records," R. 1, Ex. F— even though the auditor's report on those financial records was not included—finds no support in any of the caselaw under *Hudson*. App. A at 5a-8a.

with multiple Circuits on multiple issues. *Certiorari* is justified as to the first three Questions Presented for the same reasons that this Court agreed to review the decision of the United States Court of Appeals for the Seventh Circuit in *Hudson*, 475 U.S. at 300: because of "the importance of the case, and the divergent approaches of other courts to the issue[s]."

As to the first Question Presented, addressing public official liability for seizing agency fees in violation of 42 U.S.C. § 1983, the panel's decision apparently conflicts with this Court's decision in *Hudson*, 475 U.S. at 307 n.20 ("the government and union have a responsibility to provide procedures that minimize th[e] impingement [on First Amendment rights] and that facilitate a nonunion employee's ability to protect his rights"). It constitutes a "significant departure" from this Court's standing jurisprudence generally and from its forced-unionism jurisprudence particularly. *Lilly v. Virginia*, 527 U.S. 116, 123 (1999) (concern led to grant of *certiorari*). *See* Pet. at 10-17. Moreover, it conflicts with multiple Circuits on multiple issues, particularly as to the panel's peculiar holding that it is the contents of a union's notice—and not the seizure of their wages—which injures nonmembers' constitutional rights. *See ALPA v. Miller*, 523 U.S. 866, 876 n.4 (1998) (rejecting notion that violation occurs only upon union's expenditure of funds, not upon collection).

The Ninth Circuit's immunization of public officials against liability where they seize monies for labor unions from public employees' wages, App. A at 18a, is a new and unprecedented immunity. No authority from any other context supports the panel's decision, which radically departs from virtually every court's understanding of traditional immunity defenses under 42 U.S.C. § 1983. Moreover, it conflicts with the decisions of at least four circuits and one state Supreme Court deciding cases in the same context. *See* Petition at 14-15, ***and cases cited therein.***

Likewise, the panel's opinion on the standing of employees to challenge one of the terms of the monopoly bargaining agreement governing their terms and conditions of employment (second Question Presented) directly conflicts with *Wessel v. City of Albuquerque*, 299 F.3d 1186, 1197-99 (10th Cir. 2002), and with the implicit standing determinations of *Hohe v. Casey*, 956 F.2d 399, 405-06, 411 (3d Cir. 1992) (adjudicating similar challenges to indemnification provisions), and *Weaver v. University of Cincinnati*, 970 F.2d 1523, 1538 (6th Cir. 1992) (same).

Finally, the Circuits are badly divided as to the third Question Presented, addressing whether a labor union's indemnification of a public employer for the public employer's constitutional torts for the financial benefit of a labor union violates public policy. Two Circuits hold indemnification clauses in the context of forced-unionism schemes to be void as against public policy. *Wessel*, 299 F.3d at 1197-98 (Tenth Circuit); *Weaver*, 970 F.2d at 1538 (Sixth Circuit); *see also Cramer v. Matish*, 924 F.2d 1057 (table), 1990 WL 169640, at *4 (6th Cir. 1990) (same). A third agrees in a related context. *Stamford Bd. of Educ. v. Stamford Educ. Ass'n*, 697 F.2d 70, 74 (2d Cir. 1982). Only the Third Circuit has declined to declare such clauses void as against public policy. *Hohe*, 956 F.2d at 411-12.

III. The Conflict Among the Courts on the Question of Appropriate Monetary Remedy Is Genuine, and Review by This Court Is Justified.

CSEA alone opposes the Petition's fourth Question, seeking review of the lower courts' refusal to order disgorgement of all fees seized prior to compliance with "the constitutional requirements for the . . . collection of agency fees," *Hudson*, 475 U.S. at 310, and the panel's reversal of the District Court's order that

CSEA refund the nonchargeable portion of fees seized for the thirteen months prior to its compliance with *Hudson*'s requirements. CSEA fails to discredit the contention that there is a widespread and two-fold division among the courts (both Circuit courts and state supreme courts) on this remedial issue.

CSEA concedes, as it must, that three state supreme courts have affirmed awards of full restitution when unions failed or refused to comply with *Hudson*'s requirements. *Elvin v. Oregon Pub. Employees Union*, 832 P.2d 36, 41-44 (Ore. 1992); *Wareham Educ. Ass'n v. Massachusetts Labor Relations Comm'n*, 713 N.E.2d 363, 368 (Mass. 1999); *Gibney v. Toledo Bd. of Educ.*, 532 N.E.2d 1300, 1306 (Ohio 1988). Contrary to CSEA's suggestion, neither *Wareham* nor *Elvin* turns wholly on deference jurisprudence. Both analyze the underlying statutory and constitutional principles to affirm those orders, *Wareham*, 713 N.E.2d at 368; *Elvin*, 832 P.2d at 41-42. Neither does the illusory distinction that CSEA posits between a union's "notice" and its "procedures" diminish the conflict posed by the Ohio Supreme Court's decision in *Gibney*.[3]

CSEA also does not seriously dispute that the Ninth Circuit's reversal of the District Court's award of the nonchargeable portion of the seized fees conflicts with three circuits and one

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[3] Consistent with its canard that a notice's content harms nonmembers, CSEA expends nearly a page discussing a false dichotomy between "an adequate 'plan', i.e., '*procedures*,'" and its failure or refusal (euphemized as "neglect[]") to "attach a copy of the auditor's verification. . . . at most a technical defect in a pattern of substantial compliance with *Hudson*." CSEA's Opp. at 10 (original emphasis). Nowhere in its jurisprudence has this Court suggested that adequate notice is not a necessary part of constitutionally-adequate procedures. *See Hudson*, 475 U.S. at 306-10; *see also Dusenberry v. U.S.*, 534 U.S. 161, 167 (2002) (notice is one element required under due process clause).

state supreme court. *Lowary v. Lexington Local Bd. of Educ.*, 903 F.2d 422, 432-33 (6th Cir. 1990); *Weaver*, 970 F.2d at 1533-34; *Gilpin v. AFSCME*, 875 F.2d 1310, 1313-14 (7th Cir. 1989); *Wessel*, 299 F.3d at 1194-95; *Browne v. Wisconsin Employment Relations Comm'n*, 485 N.W.2d 376, 397-99 (Wisc. 1992); *cf. Prescott v. County of El Dorado*, 177 F.3d 1102, 1109 (9th Cir. 1999), *cert. granted, vacated, & remanded on other grounds*, 528 U.S. 1111 (2000), *reinstated in pertinent part*, 204 F.3d 984 (9th Cir. 2000) (same). Rather, CSEA argues that its subsequent remedial measures make this case sufficiently distinct to warrant the Ninth Circuit's departure from those decisions.

Those decisions are not distinguishable. *Wessel*'s rejection of an additional remedy was not rooted in the nonmembers' prior objections, but rather, in the court's conclusion that a "union's violation of procedural requirements for the collection of fair share fees does not entitle nonmembers to a 'free ride' but only to a refund of the portion of the amounts collected that exceed what could be properly charged." 299 F.3d at 1194-95. *Wessel*'s reference to the fact that some nonmembers had already objected was merely made in reference to the court's rejection of the defendants' argument that the non-members lacked standing to challenge the adequacy of the union's notice and procedures. *Id.* at 1193, *cited at* App. A at 14a n.2.

The Ninth Circuit incorrectly assumed that the *Wessel* plaintiffs "all objected to the initial notice." App. A at 14a n.2. Although not apparent from the Tenth Circuit's opinion, only eight of the thirteen *Wessel* plaintiffs objected to the initial notice, but the union there refunded the nonchargeable portion of the fees to all thirteen (and all other nonmembers) when it issued its revised notice. *Wessel v. City of Albuquerque*, 48 Fed. R. Serv. 3d 349, 2000 WL 1803818, at *1-*2 (D.D.C. 2000). Thus, *Wessel* is directly on point and directly contrary to the Ninth Circuit's

holding that not even the nonchargeable portion of the fees should be refunded to all Petitioners.

Neither does *Weaver* support CSEA's argument. CSEA cites a portion of the decision rejecting a challenge to the requirement that nonmembers object in order to avoid being subjected to fee seizures equal to full union dues. *Weaver*, 970 F.2d at 1532 (Part V), *cited at* CSEA's Opp. at 12. The portion of *Weaver* that addresses the appropriate monetary remedy appears in the next section. It reaffirms *Lowary*'s holding that " 'the proper remedy for an unconstitutional fee collection is not a refund of the total fee,' but is the refund of the portion of the exacted fees proportionate to the union's nonchargeable expenditures." 970 F.2d at 1533 (Part VI.A), *quoting Lowary*, 903 F.2d at 433.

As to the merits, CSEA offers little more than sophistry, asserting that Petitioners "confuse[] the existence of a legal violation with the separate issue of the appropriate *remedy* for such a violation." CSEA's Opp. at 7. CSEA concedes that "language in *Hudson* [is] to the effect that a union may not 'collect[]' fees until it meets the 'constitutional requirements' set forth in that decision." *Id.* (*quoting* 475 U.S. at 310). How, then, can permitting CSEA to retain fees seized when it had not complied with "the constitutional requirements for the . . . collection of agency fees," 475 U.S. at 310, be consistent with *Hudson*?

CSEA ignores the consequences clearly implicit in *Hudson*'s holding that there are "constitutional requirements for the . . . collection of agency fees." 475 U.S. at 310. CSEA conflates that holding with this Court's reasoning allowing forced-unionism provisions, quoting this Court's *precis* as to what it was trying to accomplish in *Hudson*—to "'devise a way of preventing compulsory subsidization of ideological activity by employees who object thereto *without restricting the Union's ability to require every*

employee to contribute to the cost of collective-bargaining activities.'" CSEA's Opp. at 8, *quoting* 475 U.S. at 302 (CSEA's emphasis). However, CSEA begs the question, because it fails to recognize that this Court there was discussing the circumstances under which unions may compel nonmembers' financial support, not circumstances—such as those presented here—where a union has defied the "constitutional requirements" and an appropriate remedy must be devised.

What CSEA refuses to recognize—like the panel below, when it refused to order disgorgement and reversed the District Court's order for partial restitution—is that the "refund of the *entire* agency fee" Petitioners seek does not "subvert the goal identified in *Hudson*," CSEA's Opp. at 8. To the contrary, *Hudson*'s properly-identified and principal goal of guaranteeing adequate notice and procedural safeguards to protect nonmembers' First Amendment rights is subverted by courts which allow unions to retain fees seized in defiance of *Hudson*'s mandate.

This case is particularly compelling in this regard. CSEA's cost in preparing and distributing the requisite annual financial disclosure—**after** two inadequate notices had already been prepared and distributed—was only approximately $12,000. R. 33. That is miniscule compared to the approximately $13 million realized annually upon imposition of the forced-unionism agreement upon Petitioners. CSEA's cost of complying with *Hudson*'s requirements was less than one-tenth of one percent of its expected profit from doing so. Rather than making an investment minimal in relation to its anticipated gains, CSEA gambled on the likelihood that nonmembers would not pursue their rights. And even when it lost that gamble, the courts below imposed no real cost upon CSEA for its defiance of *Hudson*'s simple and relatively inexpensive mandate. It is an iron law of economics that reducing costs promotes more of an activity.

Courts refusing to require the restitution sought by Petitioners here have so reduced the costs of *Hudson* defiance that labor unions and public employers have little disincentive to illegal conduct.

Thus, even an economic calculus that should have compelled CSEA's scrupulous compliance with *Hudson*'s mandate was ignored. Such a calculus will continue to be ignored so long as federal courts are permitted to deny meaningful economic relief to nonmembers subjected to agency fee seizures that have not been rendered lawful by strict adherence to *Hudson*'s simple requirements.

CONCLUSION

For the reasons stated above, this petition for writ of *certiorari* should be granted, and the case set for plenary briefing and argument on the important questions it presented.

Respectfully submitted,

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